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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. _____.

RALPH RICHARDSON, - - - - - *Petitioner,*

v.

C. C. BRUNNER, alone **Case 1**, - - *Respondent,*

C. C. BRUNNER,
CITY OF LOUISVILLE, KENTUCKY,
VERNON H. WETHERBY, Tax Receiver for the City of Louisville, Kentucky, **Case 2**
WM. B. MEYER, Director of Finance for the City of Louisville, Kentucky, *Respondents.*
HON. JOHN B. BRECKINRIDGE, Attorney General for the State of Kentucky.

(Case 1 and 2 Consolidated)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

I.

THE PETITION.

May it please the Court:

A. Opinions of the Court Below Are:

Richardson v. *Brunner*, 327 S. W. 2d (Ky.) 572, See Appendix I, pp. 56-59.

Richardson v. *Brunner*, 328 S. W. 2d (Ky.) 530, See Appendix II, pp. 60-61.

Richardson v. *Brunner, et al.*, 356 S. W. 2d (Ky.) 252, See Appendix III, pp. 63-66.

This writ is sought from the last opinion above mentioned.

B. Grounds on Which the Jurisdiction of This Court is Invoked.

The grounds on which the jurisdiction of this Court is invoked are; that KRS 91.540 (see Appendix IV, pp. 77-78): (1) is unconstitutional and contrary to the Fifth Amendment of United States Constitution in taking Petitioner's private property for public use or purposes without just compensation—"nor shall private property be taken for public use without just compensation"; (2) and is unconstitutional and contrary to Section One of the Fourteenth Amendment—"nor shall any State deprive any person of * * * property without due process of law"; and (3) that the Default Judgment of October 22, 1956 (Case 1, Tr. 1, pp. 16-17) is void because the Complaint (Case 1, Tr. 1, pp. 10-12) did not state a cause of action which conferred jurisdiction on the court to grant a default or any judgment, and the taking of Petitioner's property on a void judgment is most certainly taking it without due process of law.

C. Date of Judgment (Opinion) Sought To Be Reviewed.

The Judgment or Opinion of the Court of Appeals of Kentucky sought to be reviewed, was rendered Friday, February 2, 1962.

D. Date of Order Respecting Rehearing:

The Court of Appeals of Kentucky denied Petitioner's Petition for a Rehearing on May 4, 1962.

E. Statutory Provisions Believed to Confer Jurisdiction on This Court.

Petitioner believes that 28 U.S.C.A., Sec. 1257(3), confers jurisdiction on this Court to grant him a Writ of Certiorari, and he also believes that the following Federal Rules of Civil Procedure confer jurisdiction upon this Court, namely: Sub. (6) of Paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 13 and 14, 1960 Edition; Sub. (1) of Paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure U.S.C.A., p. 15, 1960 Edition; and Paragraph (c) of Rule 55, p. 289, 1960 Edition, 28 U.S.C.A., Federal Rules of Civil Procedure; and Sub. (1), Sub. (3), Sub. (4) and Sub. (6) of Sub. Paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 122, 1960 Edition.

F. Questions Presented For Review.

(1) DOES KRS 91.540 TAKE PRIVATE PROPERTY WITHOUT JUST COMPENSATION?

Cases 1 and 2. Is KRS 91.540 (see Appendix No. IV, pp. 77-78) by which the City Tax Receiver of Louisville, Kentucky, conveyed in fee Petitioner's property, worth between $23,500.00 and $34,000.00, to Respondent, C. C. Brunner, for a mere pittance—taxes, interest, penalties and costs, amounting to less than $1,200.00—contrary to the Fifth Amendment of the U. S. Constitution—"Nor shall private property be taken for public use without just compensation?"

(2) DOES KRS 91.540 DEPRIVE ONE OF PROPERTY WITHOUT DUE PROCESS OF LAW?

Cases 1 and 2. Is KRS 91.540 (see Appendix No. IV, pp. 77-78) by which the City Tax Receiver of Louisville, Kentucky, conveyed in fee Petitioner's property, worth between $23,500.00 and $34,000.00, to Respondent, C. C. Brunner, for a mere pittance—taxes, interest, penalties and costs, amounting to less than $1,200.00—contrary to Section 1 of the Fourteenth Amendment to the U. S. Constitution—"Nor shall any State deprive any person * * * of property without due process of law?"

(3) TAKING PROPERTY UNDER VOID JUDGMENT IS WITHOUT DUE PROCESS OF LAW.

Case 1—Is the default judgment of October 22, 1956, based (1) on a Complaint that did not state a cause of action, which did not give the Court jurisdiction, void? Is not the taking of property by a void judgment, taking it without due process of law? And (b) does said default judgment, based on unconstitutional statute, establish any rights, or is it a nullity?

G. Constitutional Provisions, Statutes and Rules of Civil Procedure Involved.

The Fifth Amendment and Section I of the Fourteenth Amendment of the Constitution of the United States are involved: Subsection 5 of Section 1, Sections 2, 11, 13, 14, 26, 27, Subsection 12 of Section 59, Section 171 and Section 242 of the Constitution of the

State of Kentucky are involved. 28 U.S.C.A., Judiciary and Judicial Procedure, Section 1257 (3) pp. 88, 1960 Edition, is involved. Sub. (6) of paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 13 and 14, 1960 Edition; Sub. (1) of paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 15, 1960 Edition; Paragraph (c) of Rule 55 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 289, 1960 Edition; and Sub. (1), (3), (4), and (6) of Paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 121 and 122, 1960 Edition, are involved. The Kentucky Statutes involved are KRS 91.470, 91.480, 91.490, 91.510, 91.540, 91.560 and KRS 418.040, 418.045 and 418.050 and Kentucky Rules of Civil Procedure 1, 8.01, 12.02, (6), 12.08 (1), 55.02 and 60.02 (1), (3), (4), and (6), and Rule 57 are involved, 1953 Edition Appendix IV pp. 68-80.

H. Concise Statement of Cases Containing the Facts Material to the Consideration of the Questions Presented.

CASE 1.

We believe that it will enable the Court to better understand the real issues involved if we relate in detail the history and background of Case 1 and the legal steps taken in that case as shown by the record, that is the pleadings, motions, affidavits, etc. On August 12, 1948, your Petitioner purchased the property consisting of three city lots, involved in this action,

for $17,000.00. He had this property in a Real Estate Agent's hands for the collection of rents. It was sold by the City Tax Receiver in the year 1950 under KRS 91.430 to the Respondent, C. C. Brunner for city taxes amounting to $308.34. Petitioner received no notice of said sale. His agent informed him of this fact and advised him to contact Respondent's attorneys and redeem it. Within the time allowed for redemption your Petitioner did approach Respondent's attorneys and offered to redeem his property by paying far more than the amount of the delinquent tax bills, interest, penalties and costs, but Respondent's attorneys demanded an exorbitant amount, namely, $7,000.00 and he could not raise it (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 49).

One of Respondent's attorneys admitted that he had talked to your Petitioner about repurchasing the property involved from the Respondent and did not deny that $7,000.00 had been demanded (see Affidavit of Josiah B. Gathright, one of Respondent's Counsel, Case 1, Tr. 1, p. 24).

On May 1, 1956, Respondent filed his complaint (Case 1, Tr. 1, pp. 10-12) under KRS 91.540 but as we shall hereinafter clearly show, did not state a cause of action which conferred jurisdiction upon the Court to grant the default judgment of October 22, 1956 or any judgment. Hence the default judgment is void, and takes Respondent's property without due process of law, which we shall hereinafter more clearly show. After summons was served on Respondent on May 24,

1956 and before the default judgment he tried to employ counsel but was unable to do so for two reasons, (1) each lawyer that he approached demanded a substantial cash retainer fee which he could not advance or pay, and (2) because Respondent was collecting the rents from his property (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 50). After the default judgment your Petitioner employed Mr. Stewart Miller for an agreed fee of $2,000.00 if he, Mr. Miller, could win. On November 23, 1956, Mr. Miller as attorney for the Petitioner gave notice that he would move the Court, and did move the Court to set aside the default judgment of October 22, 1956 and in support of said motion filed Petitioner's affidavit showing that he had ample personal property (KRS 91.470) subject to distraint to pay the taxes (see Motion and Affidavit, Case 1, Tr. 1, pp. 14 and 19-23). Petitioner filed also the affidavits of Charles Strull, Judge Thomas J. Knight and Carl K. Helman in support of his motion (see Case 1, Tr. 1, pp. 25-28). On December 3, 1956, the Court overruled the motion to set aside the default judgment (see Order, Case 1, Tr. 1, p. 18). Mr. Miller gave notice of appeal (see Case 1, Tr. 1, p. 29). Thereafter Mr. Miller wanted your Petitioner to give a quitclaim deed to the property for almost nothing and agreed to take $500.00 fee. Your Petitioner declined to do it and Mr. Miller withdrew from the case and returned his file to your Petitioner (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 50) and on February 26, 1957, your Petitioner employed H. E. Rose and Robert Hubbard

on a contingent basis, at which time motion for extension of a time to file an appeal was granted (see Case 1, Tr. 1, pp. 30). Thereupon Petitioner gave notice to take depositions for discovery purposes and Respondent moved the Court not to permit the taking of said discovery depositions and the Court sustained Respondent's motion and refused to permit the Petitioner to take depositions for discovery purposes (see Case 1, Tr. 1, pp. 32-33). Thereafter, Petitioner again moved the Court to set aside the default judgment and for leave to file an answer and counterclaim and for leave to file a supplemental affidavit.

The Court refused to permit him to do this but did order the tendered answer and supplemental affidavit, made a part of the record for the purpose of appeal. His motion was overruled on March 15, 1957 and notice of appeal was given, and the Schedule of Appeal to the Court of Appeals of Kentucky was filed, and again on March 22, 1957, your Petitioner moved the Court to set aside the default judgment which was overruled, and notice of appeal from that order was taken.

All of these orders were appealed to the Court of Appeals of Kentucky. The lower Court, the Court of Appeals of Kentucky on March 6, 1959, affirmed the trial court and denied permission for rehearing on October 16, 1959 (see Richardson v. Brunner, Ky. 327 S. W. 2d 572, Appendix 1, pp. 56-59).

Under argument we will hereinafter discuss that opinion.

I. Former Petition For Writ of Certiorari Denied.

This Court, when they deny a petition for a Writ of Certiorari, does not set forth or give any reason for denying it, but they have repeatedly stated that unless the question was raised in the Court below, they would not consider it. In his response to that Petition, Respondent, Brunner, repeatedly claimed that no constitutional question was raised in the Court below and consequently this court had no jurisdiction. On page eight of his response to that petition, he said:

> "Respondent insists that no constitutional questions have been raised in this court, and especially in the court below."

On page eleven, he said:

> "The Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below."

On page sixteen, he said:

> "The validity of the statute that governs this petition is not before the court and was not before the trial court below."
>
> "The Federal right must have been set up and adjudicated against the claimant by the judgment of the State Court." Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127.
>
> "Writ of Certiorari will be dismissed where record fails to disclose that complaining party definitely raised Federal question in State Court." Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

We do not know why, but we concluded that this Court denied that petition because no constitutional question had been raised in the Court below. Hence, on April 14, 1960 by motion in Case 1, your Petitioner definitely raised the constitutional question both Federal and State (see Case 1, Tr. 4, pp. 130-135) and in Case 2 on March 24, 1960, your Petitioner definitely raised constitutional question both Federal and State in complaint for Declaration of Rights (see Case 2, Tr. 1, pp. 5-17). His motion in Case 1 was overruled (see Case 1, Tr. 4, p. 140) and his complaint in Case 2 was dismissed on May 23, 1960 (see Case 2, Tr. 1, p. 28). Appeals were duly taken to the Court of Appeals of Kentucky and the Trial Courts were affirmed on February 20, 1962. A petition for rehearing was overruled on May 4, 1962.

Your petitioner, firmly believing that his cause is right and just and that the lower Court has grievously erred, comes again to this Court in a petition for a Writ of Certiorari.

J. State of Proceedings Where and When Federal Questions Raised.

CASE 1.

On April 14, 1960 by motion (see Case 1, Tr. 4, pp. 130-135), Petitioner raised Federal question before the trial Court and before the Court of Appeals of Kentucky in Richardson v. Brunner, Ky. 356 S. W. 2d 252 (see Appendix III, pp. 63-66).

CASE 2:

On March 24, 1960 by complaint and amended complaints (see Case 2, Tr. 1, pp. 5-17) raised before the trial Court Federal questions and before the Court of Appeals of Kentucky—The Court below in Brunner v. Richardson, *et al.*, Ky. 356 S. W. 252 (see Appendix III, pp. 63-66).

II.

ARGUMENT AND CONTENTIONS WHICH PETITIONER MOST RESPECTFULLY MAINTAINS FULLY AND AMPLY SUPPORT REASONS WHY THE COURT SHOULD GRANT HIS PETITION FOR A WRIT OF CERTIORARI AND REVERSE THE LOWER COURT.

A. Preliminary Remarks.

May these preliminary remarks, though not found in or required by the rules of this Court, be appropriate, persuasive and acceptable to this Honorable Court.

1. APOSTLE PAUL BEFORE KING AGRIPPA.

About nineteen hundred years ago one of the greatest men in all history, the Apostle Paul, appeared before King Agrippa and said:

> "I think myself happy, King Agrippa, because I shall answer for myself this day before thee touching all the things whereof I am accused of the Jews:

"Especially because I know thee to be expert in all customs and questions which are among the Jews: wherefore, I beseech thee to hear me patiently." Acts, Chapter 26, verses 2-3.

Indeed, we are happy and exceedingly glad that we have the privilege of petitioning this Honorable (not only the highest Court in the United States of America, but possibly the highest in the world) Court to right a grievous wrong not only to Petitioner, but a very possible and probable injury or wrong to every present and future property owner in Louisville, Kentucky and in the United States. Therefore, we very sincerely and earnestly beseech this Honorable Court to patiently and thoughtfully consider petitioner's earnest argument and reasons for relief hereafter set forth.

As Paul continued his irresistible, forceful and logical argument. "Festus said with a loud voice, Paul, thou art beside thyself, much learning doth make thee mad. But he said, I am not mad, most noble Festus; but speak forth the words of truth and soberness." Acts, Chapter 26, verses 24-25.

Now, we make no pretense to having such learning and we know that we are not mad—crazy—but also know that with unflagging and determined zeal (not fanatically, at all) we very, very sincerely and earnestly plead with this Court to right a wrong—a harsh injustice (that should make just men, civilized society blush with shame) done to your petitioner. And we, as we shall hereinafter more fully show, earnestly contend that the argument hereinafter set forth is in ac-

cord with the eternal, unchangeable, inalienable, constitutional rights of men to have their property protected against confiscation through the collection of taxes.

As Paul was about to conclude his case, "Then Agrippa said unto Paul, Almost thou persuadest me to be a Christian." Acts, Chapter 26, verse 28.

The record is silent as to whether or not King Agrippa became a Christian, but we are very confident that when the members of this Honorable Court read the reasons for asking this petition for a Writ of Certiorari, the Court will grant it and reverse the lower Court.

2. CHURCHILL—"ENGLAND'S DARKEST HOUR" —OUR PERSISTENCE.

The lower Court concluded their opinion in Case 1 with these words, "We deem it appropriate to make this comment that there may be some ultimate limit upon the number of motions that may be filed to set aside a judgment under CR 60.02." We would deem ourselves unworthy of our profession, if we shrank from our duty to exhaust every remedy available to us to relieve Petitioner from the very gross injustice, the harsh judgment—(literally confiscating his property for the benefit of Respondent, C. C. Brunner), which the lower Court, we most earnestly contend, has imposed upon him. We are doing so at a very great sacrifice. Of Duty, Robert E. Lee, said "Duty then is the sublimest word in our language. Do your duty in all things. You cannot do more. You should never wish to do less."

In 1940, "in England's darkest hour", perhaps, one of the darkest hours in the history of the world, Churchill, when despair apparently reigned supreme, when hope was almost vanished and gone, refused to either surrender or consider dishonorable terms of peace. He was fighting for a great eternal, unchangeable principle, Freedom, not only for the British Isles, but, in a very real sense, for the world. He finally won, yet the struggle still goes on.

Now, we are not so conceited or egotistical as to think that we are in a class with Churchill, still we most respectfully and earnestly maintain that we are fighting for the eternal, unchangeable principles that the inalienable right of a property owner to (1) the protection of his property; (2) that one shall not be deprived of his property without due process of law; (3) that his property shall not be taken for public purposes without just compensation, which are guaranteed to him by both the Federal and State Constitutions, shall be maintained and upheld. In a very real and vital sense we fight, not only for Petitioner's rights, but for the rights of every present and future property owner in Louisville, Kentucky, and, in fact, in all the United States.

3. DECLARATION OF INDEPENDENCE WAS DRAWN BY ABLE, LEARNED AND PATRIOTIC MEN.

While the Magna Charter (1215) and the Bill of Rights (1689) limited and restrained the power and authority of the crown to summarily impose and collect taxes, neither of these great documents limited or re-

strained parliament from enacting drastic and summary laws for the collection of taxes. The men who drew the Declaration of Independence knew all this. They were men learned in the science of civil government. They were versed in history of civil governments. They were able and patriotic. They knew the unchangeable, inalienable rights of men among which was the protection of property. They were thoroughly familiar with the drastic measures that the British parliament had enacted for the collection of taxes against the colonies.

After enumerating certain inalienable rights, they continued *"that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Nowhere can it be found in that instrument that there was an exception to the security of inalienable property rights, namely, except in the collection of taxes, by summary and arbitrary power.*

4. NO EXCEPTION IN FEDERAL OR STATE CONSTITUTIONS.

The framers of both our State and Federal Constitutions did not say that free men should be protected in their inalienable rights in respect to the protection of their property, except in the collection of taxes.

Do governments exist for the protection of inalienable rights of free man in the protection of their property rights, or do people exist for governments to arbitrarily, under the guise of collecting taxes, take their property and convey it to another for a mere pittance, a tax bill?

5. POWER TO TAX—POWER TO DESTROY.

In McCulloch v. State of Maryland, *et al.*, 17 U. S. 316; 4 Wheat 316, 4 L. Ed. 579, at p. 607, Chief Justice Marshall, said:

> "* * * that the power to tax involves the power to destroy."

The arbitrary power conferred on the Tax Receiver by KRS 91.540 is most certainly a power to destroy inalienable property rights.

6. DESTRUCTION OF GOVERNMENT "OF THE PEOPLE, BY THE PEOPLE, AND FOR THE PEOPLE"—(LINCOLN).

Lincoln concluded his famous Gettysburg address in these words—"that this nation, under God, shall have a new birth of Freedom—and that Government of the people, by the people and for the people, shall not perish from the earth."

We respectfully maintain that one of the most potent factors in the destruction or overthrow of a government of the people, by the people and for the people is to uphold summary and arbitrary statutes for the collection of taxes, which utterly disregard the taxpayers' inalienable right to the protection of his property. Due process of law—the right to be heard before his property is taken.

B. KRS 91.540 Authorizes and Empowers the City Tax Receiver to Convey the Fee Simple Title to Private Property for Public Purposes—Namely, for the Collection or Payment of City Taxes—Without Just Compensation and Is Therefore Contrary to Both the State and Federal Constitutions, Hence is Unconstitutional.

1. CITY TAX RECEIVER CANNOT SELL FOR MORE THAN A TAX BILL.

City Tax Receiver under KRS 91.480 cannot sell property for more than the tax bill—Collins v. Lane, 151 Ky. 8, 150 S. W. 977, hence it is impossible for him to give just compensation for property which he sells under KRS 91.480 and conveys under KRS 91.540. Generally speaking, it is common knowledge that the amount of a city tax bill in Louisville, Kentucky is not as much as one-seventieth or one-eightieth of the real value of the property—hence KRS 91.540 is contrary both to the Federal and State Constitutions in that it authorizes the taking of private property and giving it or conveying it to another for public purposes without just compensation.

2. SELLING AND CONVEYING PRIVATE PROPERTY TO COLLECT TAX BILL OR TO PAY A TAX BILL IS SELLING AND CONVEYING IT FOR PUBLIC PURPOSES—THAT IS, COLLECTION OF TAXES.

Section 171 of Kentucky's Constitution reads in part as follows:

> "Taxes shall be levied and collected for public purposes only."

The lower Court in Industrial Development Authority, *et al.* v. Eastern Ky. Regional Planning Com-

mission, 332 S. W. 2d (Ky.) 274 (decided Feb. 12, 1960), said:

> *"Thus, the Constitution of this State requires that taxes shall be exacted and used for public purposes only."*

The only reasonable, logical conclusion that can be drawn is that the sale of private property for tax bills is the taking of said property for public use or purposes.

In the case of C & O Ry. Co. v. City of Silver Grove, 249 S. W. 2d (Ky.) 520 (decided 1952), Silver Grove sought to incorporate under the name of City of Silver Grove. It sought to include sixty-four acres of the C & O Railway Company's yards, etc., solely for the purpose of levying and collecting taxes on the said railroad company's property. The railroad company in pleading to the action, among other things, said "which sixty-four acres are owned by the railway company and can never be adapted to any municipal use . . . it is the purpose and intent of the incorporators of the proposed city, in including the company's yards within the proposed boundary of the city, to subject the company to municipal taxes . . . the inclusion of the real estate within the boundaries of the proposed city will deprive the company of its property by the levy and collection of municipal taxes without any benefits to the company; the company will thereby be deprived of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and Section 2 of the Constitution of Kentucky."

The trial Court ruled against the railroad company and in favor of the proposed municipal incorporators. The Court of Appeals of Kentucky (the lower Court) in reversing the trial Court quoted with approval from one of its former opinions and said:

> *"We think this is a case of taking private property for public use under the form of taxation, and that it is within the prohibitory clause of the Constitution, and therefore unconstitutional and void."*

Now, if the inclusion of property in a proposed boundary for an incorporated city for the purpose of levying and collecting taxes on it is the taking of property by the way of taxation for public use, then most certainly the selling of private property to collect tax bills is taking the property for public use. What are taxes collected for anyhow, but for public use. So when a piece of private property is sold to pay taxes it is taken for public use; it is inescapable.

Neither the Constitution of the State of Kentucky nor the Constitution of the United States read "nor shall private property be taken for public use without just compensation", except for the collection of taxes.

Neither the State nor the Federal Constitutions make any such exception, and we most earnestly and respectfully maintain that no Court can hold KRS 91.540 constitutional without reading into the Constitution an exception which is not there.

C. Due Process of Law, Even in the Collection of Taxes (Neither the Federal Nor the State Constitutions Make Any Exceptions) Means a Notice and an Opportunity to be Heard, Before, *Not After*, Private Property Is Taken.

In the case of the City of Louisville v. Cochran, 82 Ky. (John Rodman) 15, the validity of a statute pertaining to the collection of city taxes was involved. It was held unconstitutional. The lower Court, in that opinion, recognized that to a certain extent summary proceedings were justifiable in the collection of taxes, but even so, the Court said that ministerial offices in the collection of taxes must give the taxpayer an opportunity to be heard.

The lower Court in that case among other things said:

> "* * * It is important that we understand here what is the meaning of 'due process of law', or 'the law of the land.'
>
> "This court said, in Varden v. Mount, Hines, Judge, 78th Kentucky, 89:
>
> "'The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property.' * * *
>
> "It is now generally understood by citizens, as well as courts, that the Legislature has no power

to interfere with title of the citizen to his property, or to interrupt him in its free enjoyment, *much less to transfer it*, against his will, to another, either by express enactment or destruction of the remedies for its defense and protection. * * *

"And while this summary remedy for levying, assessing, and collecting taxes has the plea of necessity and immemorial usage for its support, every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby. * * *

"These authorities, and many others not necessary to cite, may be considered as settling the question that summary process, usually adopted in this and other States for the enforcement of the taxing power, is not contrary to the law of the land, as secured to the citizen by the constitution. But in every case, and under all forms of remedy, the citizen has a right, which must be preserved, to be heard before some tribunal on all questions which are essential to the constitutional protection of his property. The power to levy and collect taxes is an incident of sovereignty, and it belongs to the legislative department, but the exercising of that all-pervading power, like every other governmental power, is so limited that it cannot be arbitrary, and is subject to rules prescribing bounds to the purpose of the levy, and regulating the manner of assessment and collection. The purpose must be

public, which is usually ascertained by the benefits to flow from the collection of the tax to the public and the consideration which supports the exaction from the citizen. * * *

"For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results. (Vanzant v. Waddell, 2 Gerger, 270.)

"And the manner of the exercise of an otherwise just and clear authority may be as usurpatory as an arbitrary assumption, and it is the most insidious method of unauthorized acquisition of power, whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground of respectful, but determined disregard.

"* * * Thus, while summary process, based upon necessity and immemorial usage, is allowed, and its execution generally and properly confided to ministerial officers, the rights of the citizens are guarded by 'the law of the land' from invasion, in the name of this very summary process itself, and by the unregulated assertion and the unconstitutional assumption of power."

The validity of an act of the Legislature authorizing and empowering the auditor to convey the title by tax deed was involved in Maguiar v. Henry, etc., 84 Ky. 1.

The Court of Appeals of Kentucky said:

"* * * The laws for the assessment and collection of taxes are necessarily summary in their character. Title is divested by special statute; but it is stricti juris, and must be followed in all ma-

terial respects. The taxpayer is entitled by the 'law of the land,' to be heard before he is condemned. Magna Charta gave him this right. 'No free man shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.'

"The Constitution of the United States re-echoes this fundamental rule, so early established, by providing that no person shall be deprived of life, liberty, or property, 'without due process of law'; while our State Constitution says, 'nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.'

"* * * When a litigant claims rights under the act of an officer he should state the facts which show that the latter had a right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken; the power is not created. * * *"

The case of Board of Levee Com. v. Johnson, *et al.*, 178 Ky. 287, 199 S. W. 8, involved the validity of an act (1914) authorizing the assessment and collection of an acreage tax. The act was held unconstitutional, and from that opinion we quote:

"* * * We need only to say that the substance of them is that 'due process of law', and the 'law of the land' mean when applied to actions, proceed-

ings or prosecutions pending in any court that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of practice and procedure before judgment is pronounced depriving him of either. Cooley's Constitutional Limitations, 6th ed., page 429; Hutrado v. People of California, 110 U. S. 516, 28 L. Ed. 232; Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569; Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780; Ely v. Thompson, 3 A. K. Mar. 70; Varden v. Mount, 78 Ky. 86; City of Paducah v. Ragsdale, 122 Ky. 425; City of Louisville v. Cochran, 82 Ky. 15; Marshall v. McDaniel, 12 Bush 378. * * *

"It should further be said that the protective principles that find expression in the words 'due process of law' and 'the law of the land', are not confined to strictly court proceedings or to cases or prosecutions pending in a court of justice; but they are broad enough to and do include efforts to take the property of the citizen when the attempt is made to do so under a power lodged by legislative authority in some quasi judicial tribunal such as the city council of a city or a board invested with authority to assess, levy and collect taxes or take property for public purposes. * * *.

"* * *. The collection of taxes under such summary laws is generally and properly confided to ministerial officers. And when the power of levy and assessment is delegated, notice is usually required as to the former and must be given, and an opportunity to be heard allowed as to the latter. And while this summary remedy for levying, assessing and collecting taxes has the plea of neces-

sity and immemorial usage for its support, every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby. * * *

* * * * But in every case, and under all forms of remedy, the citizen has a right, which must be preserved, to be heard before some tribunal on all questions which are essential to the constitutional protection of his property." * * *

In General Electric Company v. American Buyers Cooperative, Ky. 316 S. W. 2d 354, an act of the Legislature giving the General Electric the right to fix prices of goods that it sold to retailers, etc., was declared unconstitutional by the Lower Court because it created an arbitrary and absolute power in the General Electric to control contracts and deprive the purchaser of the right of protecting his property. From that opinion we quote briefly:

"Reasons for holding the nonsigner statute invalid: * * * (6) It offends our constitutional guaranties of a right of personal liberty and private property and allows a citizen to be deprived of his property without due process of law * * * our Bill of Rights declares as one of the 'great and essential principles of liberty and free government' and as 'inherent and inalienable * * * the right of acquiring and protecting property.' Sec-

tion 1, Fifth * * * Supplemental to this property right provision is Section 2 of the Constitution which forbids the exercise of arbitrary power of government over the 'property of free men'."

The lower Court in their opinion of February 2, 1962, in Case 2, very erroneously held that the principles set forth in their opinions in the above mentioned cases, namely, City of Louisville v. Cochran, 82 Ky. 15; Maguiar v. Henry, 84 Ky. 1, and in Board of Levee Commissioners v. Johnson, et al., 178 Ky. 287, 199, page 8, have no application to the case at bar.

The lower Court in those opinions very clearly and definitely stated that due process of law in the taking of private property meant that the property owner *was entitled to a notice and a hearing before—not after —his property was taken.*

We most respectfully insist that those principles apply to the case at bar and to any other case where private property is taken, and that the lower Court erred greatly in not applying them.

We shall in the next succeeding paragraph D conclusively show that the lower Court is in error in not applying the principles of due process of law set forth in the above opinions.

The text writer of American Jurisprudence on Constitutional Law, Volume 12, pages 267 and 268, Section 573 has this to say on due process of law:

"573. *Essential Elements.*—The essential elements of due process of law are notice and an opportunity to be heard and to defend in an

orderly proceeding adapted for the nature of the case before a tribunal having jurisdiction of the cause. One of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College Case, in which he declared that by due process of law is meant 'a law which heard before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' * * *.

"Expressed in other language, the words 'law of the land' or 'due process of law', when used in considering the property rights of individuals, mean summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading of the facts in issue, and a determination thereof by a jury or by a court in accordance with settled practice. In any proceedings where notice is essential, the view has been taken that the law authorizing such proceedings must require notice; otherwise, it will be unconstitutional."

We could multiply quotations almost indefinitely from recognized legal text writers to the same effect, namely, that due process of law in the taking of private property means that the property owner shall have *notice and a hearing before—not after—his property is taken.*

This Court and the highest courts of practically every State in the Union have held that due process of *law in the taking of private property means notice and a hearing before—not after—the property is taken.*

D. KRS 91.540 Is Contrary to Both the Federal and State Constitutions in That It Takes Private Property Without Due Process of Law, That Is, a Notice and a Hearing Before—*Not After*—the Property Is Taken or Conveyed or Given Away for a Mere Pittance of Tax.

An analysis of KRS 91.540 in connection with KRS 91.560, 91.470, 91.480, 91.490, 91.510, and in connection with the opinions of the lower Court in Interstate Bond Co. v. Williams, 290 Ky. 850, 162 S. W. 2d 770; Brunner v. Bell, Ky. 290 S. W. 2d 461, most certainly and definitely discloses that the taxpayer does not have any notice of the hearing before his property is conveyed under KRS 91.540.

KRS 91.560 grants the City a lien for taxes upon property within its corporate limits. KRS 91.490 confers authority upon Tax Receiver to distrain and sell personal property under KRS 91.470 and to sell real property under KRS 91.480 for the payment of taxes.

KRS 91.470 authorizes him first to distrain and sell personal property if available. KRS 91.480 confers upon him the authority to sell real property, if no personal property is available, for the payment of taxes. KRS 91.510 provides for a redemption within two years and then if not redeemed the purchaser under the conditions stated under KRS 91.540 shall be entitled to a deed in fee simple. The lower Court in the aforementioned opinions and in many others, has consistently held that a deed of the Tax Receiver under KRS 91.540 is absolutely void and conveys no title or interest whatsoever, unless in the sale

of the property the mandatory provisions of KRS 91.470 and 91.480 are strictly complied with. We most earnestly contend that KRS 91.540 deprives the property owner of due process of law in this—it authorizes the conveyance of the property without giving the opportunity to *the property owner before—not after—it is conveyed, to be heard on whether or not the Tax Receiver in the sale of the property complied with the provisions of the Statute in reference to the sale thereof.*

As a matter-of-fact the Respondent, the Tax Receiver, Mr. Wetherby who has been Tax Receiver for ten years, never in any sale complied with the provisions of the Statutes above mentioned.

Mr. Wetherby, the City Tax Receiver, was honest. He candidly admitted (1) that he never distrained personal property; (2) that he never held an auction.

"Q. Mr. Wetherby, since you became the City Tax Receiver for the City of Louisville in 1952, up to the present, have you ever levied upon or distrained personal property of any delinquent taxpayer before you sold the real estate for delinquent taxes?

Mr. Bell: Again enter my objection because he had not alleged in his pleadings any allegations in reference to levying on personal property.

Mr. Hubbard: You decline to answer that?

The Witness: I might answer it, No.

Q. You never have?

A. No. * * *

Q. I'm talking about since you have been Tax

Receiver, you have never distrained on any personal property for any delinquent tax bill?

A. That's right. * * * (Tr. 1, Case 2, pp. 38-39).

Q. Mr. Wetherby, in sales of delinquent tax bills on real estate, you just sit around a table and ask this man and that man if he wants this piece of property or that piece of property, is that right?

A. Yes, sir, that is the way the sale is conducted.

Q. In other words, Mr. Wetherby, you don't auction and say, 'who will bid on this tax bill, so much,' or anything like that?

A. No, sir, I do not.

Q. Let's go over and ask—

A. We only—we only sell for the amount of the taxes due the City. There is no bidding on it.

Q. You just—if you mean that circle around you, ask him if they want this or that?

A. There is probably eight or ten of them there.

Q. I say a few men—

A. Yes, sir, a few.

Q. You just ask which one wants this—

A. That's right."

(See Tr. of Record, Case 2, pp. 37-38)

We mention here the above testimony to emphasize the unconstitutionality of KRS 91.540 in that it takes —conveys private property for the payment of municipal taxes without notice and an opportunity to be *heard, before, not after, the taking as to whether or not the Tax Receiver, in the sale has complied with the mandatory provisions of KRS 91.470 and KRS 91.480;*

and further to emphasize the fact of the privilege of (Brunner v. Bell, 290 S. W. 2d 461) coming into court after his property has been taken, does not render KRS 91.540 constitutional; and to further emphasize the utter futility (as in Case 1 at bar) of trying to recover his property after it has been conveyed. Under a subsequent paragraph .... we shall comment further on this.

E. Default Judgment of October 22, 1956, Case 1, Is Void Because Complaint Did Not State Cause of Action Which Conferred Jurisdiction Upon the Court to Grant It. Hence, Taking of Petitioner's Property Under It, Is Without Due Process of Law and Contrary to Both the Federal and State Constitutions.

(1) THREE CONDITIONS MUST EXIST IN A COMPLAINT TO CONFER JURISDICTION UPON THE COURT TO RENDER A VALID JUDGMENT. IF ANY ONE OF THEM IS ABSENT THE JUDGMENT IS VOID.

There are three conditions or essential elements which must exist in a complaint to confer jurisdiction upon a court to grant a valid judgment. If any one of them does not exist the judgment is absolutely void. They are: (1) jurisdiction of the person, (2) jurisdiction of the subject matter and (3) a complaint that states cause of action. Lowther v. Moss, 239 Ky. 290, 39 S. W. 2d 501; Wagner, *et al.* v. Peoples Building and Loan Association, 292 Ky. 691, 167 S. W. 2d, 825.

(2) WHERE RIGHT OF ACTION IS STATUTORY, PROVISIONS OF STATUTE MUST BE PLEAD OR A JUDGMENT RENDERED ON SUCH A COMPLAINT IS VOID.

Where right is purely statutory, the provisions of the statute must be plead in order to confer jurisdiction to render a valid judgment. If they are not plead the judgment is absolutely void. Penick v. Commonwealth for use and benefit of Barnett, 250 Ky. 86, 61 S. W. 2d 1098; Burkhart v. City of Newport, 265 Ky. 796, 97 S. W. 2d 803. Liberal rules of Pleading under Kentucky Rules of Civil Procedure 8.01 do not relieve anyone from pleading the provisions of the Statute upon or under which he claims his right. Johnson v. Coleman, *et al.*, Ky. 288 S. W. 2d 348; Hodges v. Hodges, Ky. 314 S. W. 2d 208. See also Rule 1 of the Kentucky Rules of Civil Procedure.

(3) RESPONDENT C. C. BRUNNER'S COMPLAINT CASE 1. HIS CAUSE OF ACTION, IF ANY HE HAS IS BASED ON KRS 91.540. IT IS FATALLY DEFECTIVE IN THAT IT DOES NOT SET FORTH THE NECESSARY PROVISIONS OF SAID STATUTE. HENCE THE DEFAULT JUDGMENT OF OCTOBER 22, 1956 IS VOID. IT CONFERS NO RIGHTS. IT IS A NULLITY. IT TAKES PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

In order to state a cause of action under KRS 91.540 (for his, C. C. Brunner's cause of action, if any he has, is based upon said statute) it was absolutely necessary, as is hereinabove clearly shown, for Respondent to plead the terms of the statute, namely, (1) that the property had not been "redeemed within the time allowed for redemption" and that he, the purchaser, had paid "all City tax bills or assessments made against the property after the assessment of the taxes for which it

was sold, with interest as provided by KRS 91.430." He did not plead the above terms of the statute, in fact the only phrase of the statute that he did plead was that he was entitled to possession. We most seriously and earnestly contend that such a pleading was not sufficient to confer jurisdiction upon the court to render the default or any judgment thereon. Hence the default judgment of October 22, 1956 in Case 1 is absolutely void. Scholl v. Margulis, 215 Ky. 62, 284 S. W. 421; Wolfe County, *et al.* v. Tolson, *et al.*, 283 Ky. 11, 140 S. W. 2d 671. Both Kentucky (Kentucky Rules of Civil Procedures are based upon the Federal Rules) and Federal Rules of Civil Procedure require that a cause of action must be stated in order to confer jurisdiction and this cannot be waived by default. Federal Rule 12 (b), Kentucky Rule 12.02(6) "failure to state a claim upon which relief can be granted." Hence the default judgment of October 22, 1956,

> "A void judgment * * * has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights. It is not entitled to enforcement and is, ordinarily, no protection to those who seek to enforce it. It may be attacked by a person adversely affected by it, in any proceeding, direct or collateral, and at any time. All proceedings founded on the void judgment are themselves regarded as invalid. In other words, a void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment. It accordingly leaves the parties litigant in the same position they were in before the trial." 30A Am. Jur., under Judgments, Sec. 45, pp. 197-199.

(4) TAKING PETITIONER'S PROPERTY BY AND UNDER A VOID JUDGMENT IS MOST CERTAINLY—A TAKING WITHOUT DUE PROCESS OF LAW AND CONTRARY TO SECTION 1 OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We do not believe that this statement needs much if any amplification. As hereinabove pointed out, a void judgment is a nullity. It neither confers or takes any rights. Most certainly then the taking of petitioner's property in Case 1 under the void, default judgment of October 22, 1956 is taking his property without due process of law. *He most certainly is entitled to his day in court on a complaint that states cause of action.*

F. Case 1. The Lower Court Erred Greatly in Refusing to Pass Upon the Constitutionality of KRS 91.540 in Case 1 and in Holding "So Richardson's motion Under CR 60.02 Could Not Put in Issue the Question of the Constitutionality of the Statute." The Former Opinions—Richardson v. Brunner, Ky., 327 S. W. 2d 572, and Richardson v. Brunner, Ky., 328 S. W. 2d 154—of the Lower Court Should Also Be Considered in This Connection.

(1) VOID JUDGMENT IS NOT ENTITLED TO ANY RESPECT, HENCE, DOES NOT EFFECT THE QUESTION OF CONSTITUTIONALITY OR UNCONSTITUTIONALITY OF KRS 91.540.

In the next preceding paragraph E, we have clearly shown that the default judgment of October 22, *1956 is void for lack of jurisdiction of the court, and hence it is not res judicata for anything, especially as to the constitutionality or unconstitutionality of KRS 91.540.* The lower court erred greatly in holding that your petitioner did not by motion raise the question of constitutionality of said statute.

(2) THE CASE OF COMMONWEALTH v. JEFFERSON COUNTY, 300 KY. 514, 189 S. W. 2d 604—NOT APPLICABLE CLEARLY DISTINGUISHABLE.

In the Commonwealth v. Jefferson County case *supra*, the Commonwealth before a trial court of general jurisdiction sought to have an Act of the Kentucky Legislature declared unconstitutional. The trial court held it valid. No appeal was taken to the Court of Appeals of Kentucky. Two years later, after the time for an appeal had expired, the Commonwealth instituted an entirely new and separate action, in which it again sought to have the same Act declared unconstitutional. Note there were two separate and distinct actions. Not so in Case 1 at bar. There is only one action in it. The Court of Appeals of Kentucky, the lower court, in the Commonwealth case *supra*, held that the judgment in the first case or first instance was *res judicata* to the second action. In the Commonwealth case *supra*, no right of anyone had been adjudicated. In Case 1, in the same case, the case at bar, a default judgment had been rendered against the petitioner under a statute, which petitioner as hereinabove shown, under paragraphs B, C, and D, is clearly unconstitutional. Kentucky Civil Rule of Procedure 55 and Federal Rule of Procedure 55 (c) pertaining to setting aside default judgments are the same. Kentucky Rule of Civil Procedure 60.02 and Federal Rule of Civil Procedure 60 (b) are the same. In fact, the Kentucky Rules of Civil Procedure are an almost verbatim copy of the Federal Rules. Kentucky Rule 60.02 and the Federal Rule 60 (b) set forth these

grounds for setting aside a judgment, especially a default judgment. Petitioner's motion in the same case to set aside the default judgment on the ground that it is and was void because the statute upon which it was based was and is, unconstitutional, did most certainly raise the constitutionality of KRS 91.540 and the lower court's holding to the contrary is erroneous and unsound. If petitioner could not in the same case by motion put the constitutionality of KRS 91.540 in issue, then by the same process of reasoning no litigant could put in issue in the same case any one of the other five grounds, namely,

> "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment."

By the same process of reasoning a default judgment would be *res judicata* on any one of the above grounds for setting it aside and Rules 55 and 60.02 would be rendered meaningless. The lower court greatly erred in holding otherwise.

(3) INTERNATIONAL HARVESTER COMPANY OF AMERICA v. COMMONWEALTH, 170 KY. 41, 185 S. W. 102.

The Harvester Company case *supra*, by default judgment was fined $1,000.00 for the violation of certain Act of the Legislature of Kentucky which the lower court repeatedly held to be constitutional and not contrary to the Fourteenth Amendment of the Constitution of the United States. This court in International Harvester Company v. Kentucky, 234 U. S. 26, 34 Supreme Court, 853, 58 L. Ed. 1284, reversed the lower court and held that the Acts of the Legislature of Kentucky under which the Harvester Company was fined $1,000.00 by a default judgment was unconstitutional—contrary to the Fourteenth Amendment of the United States Constitution. Notwithstanding the opinion of this court, the Commonwealth of Kentucky undertook in a civil action *supra*, to collect its default judgment. The Harvester Company contended that the default judgment against it was void because it was based upon a nonconstitutional Act. The lower court, the Court of Appeals of Kentucky sustained the contention of the Harvester Company, hence held said judgment void. From that opinion we quote:

> "Is the judgment erroneous nierely, or is it void? The authorities we have had an opportunity to examine all seem to agree that as a general rule all acts done under an unconstitutional law are void and of no effect, and that judgments rendered in the courts, or judicial proceedings under unconstitutional statutes, are void; also that a decision by a court of last resort, that a statute is un-

constitutional, has the effect of rendering such statute absolutely null and void from the date of its enactment and not from the date on which it is judicially declared unconstitutional, 3 Cyc. 804, 805. It also seems to be well settled that the fact that a judgment is rendered by default cannot be taken to cure or waive radical defects going to the authority of the court to enter the judgment or to the foundation of plaintiff's cause of action. 23 Cyc. 751, 752. In this jurisdiction it has time and again been held, beginning with the earliest decisions, that a void judgment is subject to collateral attack from any person affected by it. Gullett v. Blanton, etc., 157 Ky. 457; Puckett, *et al.* v. Jameson, Sheriff, 157 Ky. 172; Robinson v. Charleston, etc., 123 Ky. 419; Bean v. Everett, 21 Rep. 1790; Carpenter v. Moorelock, 151 Ky. 506.

"Is there any difference between a judgment which is void because the court was without jurisdiction of the subject matter and a judgment based upon a void statute? We think not. In either case the court would be without authority to render the judgment. * * *

"* * * An unconstitutional law is void, and is as no law.

"* * * If the case here presented involved an attempt to enforce satisfaction of a void judgment rendered in a civil action, whether void because the court in which it was rendered had no jurisdiction of the subject matter or because it was founded on an unconstitutional statute, the defendant could, in either event, defeat its enforcement on that ground, or, without awaiting an action by the plaintiff for its enforcement, could himself, under the decisions in this jurisdiction, by suit

enjoin its enforcement. If either of such remedies would be available to a party to rid himself of a void judgment rendered against him in a civil action, what valid objection can be urged to his right to resort to them for relief against a void judgment rendered in a criminal or penal prosecution * * *."

Twenty-nine years later the lower court in Commonwealth, *et al.* v. Jefferson County, *et al.*, *supra*, reversed their opinion in th Harvester case, and on January 26, 1962 in Veith, *et al.* v. City of Louisville, *et al.*, Ky. 355 S. W. 2d 295, the lower court held that a judgment of the Jefferson Circuit Court rendered some months before and not appealed, was not *res judicata* of a second action, pertaining to the same statute. We most certainly maintain that the decision in the Harvester Case is sound and that the decision in Commonwealth v. Jefferson County, *supra*, is unsound.

The first sentence of Sec. 19, p. 171 of 30A *Am. Jur.*, reads thus:

> "* * * The limitations inherent in the requirements of due process and equal protection of the law extend to all functionaries of state governments, judicial as well as political, so that a judgment may not be rendered in violation thereof. * * *."

The judiciary is bound by and subject to and limited by the limitations, inhibitions and prohibitions of the constitution, just the same as the legislative and executive branches of the government are. In 12 *Am.*

Jur., Sections 473 and 586, pages 137 and 283, the text writer says:

#473. "The inhibitions of the Fourteenth Amendment include all the departments of state government, the judicial as well as the political. A similar extent is accorded to like state constitutional provisions. A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments. * * *

"* * * All governmental agencies authorized by the state, particularly municipal corporations, are within the purview of the clause.

"#586. Generally.—The requirements of due process of law extend to every case of the exercise of governmental power. The limitations inherent in the requirements as to due process of law are binding equally on the United States and on the several states.

"A state may not by any of its agencies, legislative, judicial, or executive, disregard the constitutional prohibition. This inhibition includes all functionaries of state government, judicial as well as political.

"* * * Where rights are acquired by a citizen under the existing law, there is no power in any branch of the government to take them away except by due process of law. The purpose of this clause is to exclude arbitrary power from every branch of the government. So far, at least, as the Fourteenth Amendment is concerned it is a restraint on the legislative, executive, and judicial departments of the state. It seems undoubted that the people of a sovereign state in drafting and

adopting a state Constitution are bound to respect these limitations equally with the legislative and other departments of government acting under such Constitution.

"The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials."

We most certainly maintain that if this Honorable Court holds that a judgment, especially a default judgment rendered under a non-constitutional Act that deprives a person of his property without due process of law and without just compensation, is binding and cannot be collaterally attacked as void, we had just as well throw away our constitutions as mere scraps of paper.

(4) RALPH RICHARDSON v. C. C. BRUNNER, KY. 327 S. W. 2d 572. CASE 1 AT BAR.

We make three observations on the above opinion, (1) the case of Dant v. Progress Paint Mfg. Co., Ky. 309 S. W. 2d 187, upon which the lower court based their opinion is clearly distinguishable and not applicable to the case at bar. In the Dant case, Dant had a lawyer. He not only had a lawyer but the trial court informed him and his lawyer that he must take proof on depositions and have it in within a certain time. Instead of doing that Dant ignored the Court's orders, discharged his then attorney and employed another attorney who completely ignored the Court's orders. Of course there was no excuse for such conduct. In the case at bar, Case 1, however, your petitioner Rich-

ardson did not have an attorney--(see his affidavit, Tr. 4, Case 1, p. 50) and could not empty one because he could not raise the money to do so. (2) The lower court in Case 1 abused a sound discretion. The lower court has repeatedly declared that default judgments are not favored and should be set aside, especially when motion is seasonably made and a meritorious defense presented.

In the case of Carr Creek Community Center v. Home Lumber Company, 276 Ky. 840, 125 S. W. 2d 777, there was a long extended litigation. ALL PARTIES HAD COUNSEL. Yet, nothwithstanding, the parties had counsel, there was a default judgment against some of the parties. The trial Court overruled motions to vacate the default judgment and the lower court reversed the trial court. From that opinion we quote:

> "A prerequisite to the exercise of the rule laid down by the Courts, in passing on motions to vacate default judgment, it must appear that the movant is able to present a valid defense, * * * on the whole case, after giving it the most careful attention, we express the opinion that the Court below should have set aside the judgment of December 12, and permitted the appellant to plead. The Court, in the exercise of that broad discretion manifested by our holdings in the cases cited, would have met the ends of justice in granting a new trial. * * * Judgment reversed and cause remanded for new trial consistent with this opinion."

In the case of Strother, *et al.* v. Day, *et* al., (Ky.) 248 S. W. 2d 347, a suit was filed by one Strother and others to cancel a contract of transfer to the defendants, Herbert R. Day, *et al.*, some personal estate and a deed. The defendants filed a pleading styled "Special Demurrer and Answer." No reply having been filed, sometime thereafter, a default judgment was rendered in favor of the defendants. A motion was seasonably made to set aside the default judgment. The trial Court overruled this motion. On appeal to lower Court, the case was reversed. From that opinion we quote:

> "It seems to us that the Court should have vacated the default judgment upon plaintiff's motion. *It is familiar law that default judgments are not looked upon with favor if the party against whom they go was in any way thrown off guard or mislead and shows at the same term of the court that he has a meritorious defense.* Vanover v. Ashley, 298 Ky. 722, 183 S. W. 2d 944; Kidd v. B. Perina & Sons, 313 Ky. 727, 233 S. W. 2d 255."

In Carr, *et al.* v. Brownfield, (Ky.) 255 S. W. 2d 623, the Carrs obtained a default judgment against Brownfield on an alleged breach of contract relating to making certain repairs on Carr's residence. Both parties had attorneys. There was a default judgment in the favor of the Carrs. A motion was seasonably made to set it aside, which motion evidently showed a valid defense and the trial Court sustained it.

The trial Court, notwithstanding the careless failure of both defendant and his counsel in that case

(petitioner in the case at bar did not have counsel) in failing to make some defense; set aside the default judgment because the defendant presented a meritorious defense and, on appeal to the lower Court, the trial Court's order setting aside default judgment was sustained. Among other things, the lower Court said:

> "There is no escape from the conclusion that both Brownfield and his attorney were careless in failing to make some defense to Carr's suit."

In the comparatively recent case (October 4, 1957) of Bargo *v.* Ray C. Lewis, Judge, (Ky.) 305 S. W. 2d 757, it appears that Bargo had obtained a default judgment against the Metropolitan Life Insurance Company. An attorney in Lexington, Kentucky representing the Metropolitan Life Insurance Company had attempted to employ an attorney in Barbourville, Kentucky to secure an extension of time for answering the complaint and the Barbourville attorney didn't understand his employment. Hence, upon a failure to answer there was a default judgment. A motion was seasonably made to set it aside and the above-styled action was originated in the lower Court to prohibit the trial judge, Judge Lewis, from entering an order setting aside said default judgment. The lower Court denied the petition for a write of prohibition and concluded their opinion in the following language:

> "The situation, therefore, was one in which the Lexington attorney thought that he had arranged with the Barbourville attorney to obtain an extension of time for answering and the latter thought

he was to be concerned only with the trial of the case. In these circumstances, we cannot say that the Circuit Court Judge abused his discretion in finding that the default was the result of inadvertence or excusable neglect. See CR 55.02, 60.02; Rosen v. Galizio, 184 Ky. 212 S. W. 104. *Default judgments are not favored, and it appears from the tendered answer that the defendant has meritorious defenses.*"

The text writer of Am. Jur., 30A, Sec. 636, page 609, has this to say on setting aside default judgment, to-wit:

> "Under the tendency of the courts to require causes of action to be tried upon the merits, judgments by default are regarded as peculiarly within the rule conferring authority on courts to open, correct, or vacate their own judgments. The provisions of statutes for the opening or vacation of default judgments are liberally construed and, although the setting aside of such a judgment is ordinarily within the discretion of the court, in a case of reasonable doubt such discretion is usually exercised in favor of granting the application so as to permit a determination of the controversy upon the merits."

We respectfully and vigorously maintain that the lower Court abused a sound discretion in their first opinion in the case at bar in declining to apply the principles set forth in their opinions above mentioned. The lower Court erred greatly.

In the third place the lower Court declined to apply their own principles, especially in Brunner v. Bell, Ky.

290 S. W. 2d 461. In that case and many other cases, the lower Court held that if the Tax Receiver had not complied in the sale of the property with the mandatory provisions of KRS 91.470 and 91.480 then his deed was void. In the case at bar Case 1, your petitioner made a seasonable motion to set aside the default judgment and supported it by an affidavit (see Tr. 1, Case 1, pp. 17, 19-23) to the effect that he had ample personal property subject to distraint to pay the taxes. He made subsequent motions and attempted to file a counterclaim which set out a perfect defense which the Court refused to permit him to file and supported his motion to file it with a supporting affidavit (Tr. 1, Case 1, pp. 36-51).

The lower Court erred greatly in not applying the principles in Brunner v. Bell, *supra,* to the case at bar.

G. Case 2 Involved Herein.

The lower Court erred greatly in holding that KRS 91.540 was constitutional because the petitioner could come in after his property was taken and have a hearing.

(1) In their opinion the lower Court among other things said:

> "Judgment was entered dismissing the action on the ground that the complaint as amended failed to state a claim on which relief could be granted.
>
> "* * * It is significant that the pleadings do not allege any actual failure of the tax authorities

to comply with the statutory requirements relating to levy, sale and redemption, in regard to Richardson's tract of land."

The lower Court erred greatly in the above statements. Your petitioner most certainly stated the cause of action for declaration of rights under KRS 418.040, 418.045 and KRS 418.050 (see Tr. 1, Case 2, pp. 5-12; see Appendix 4, pp. 79-80).

He stated clearly and definitely that an actual controversy existed between him and the Respondent, C. C. Brunner as to whether or not KRS 91.540 was constitutional and as to whether or not the Tax Receiver could convey his property to the Respondent, C. C. Brunner under said statute. George v. Bernheim Distilling Company, 300 Ky. 179, 188 S. W. 2d 321. He was not in that complaint trying to raise the question of failure of the Tax Receiver to comply with the statutory requirements relating to sale so it was not necessary for him to allege those things.

In their opinion in Case 2 the lower Court said that that there was no merit in your petitioner's contention that he was entitled to a notice and hearing before his property was conveyed under KRS 91.540 because he could have a hearing after his property was taken.

We think that we have most certainly and clearly *shown that due process of law requires a hearing before, not after, the taking of property.*

The lower Court said that petitioner's second ground of attack, namely, that the Tax Receiver or

the Respondent, if guilty of any conduct misleading the taxpayer (your petitioner) as to his right of redemption, was without merit because the lower Court would provide appropriate relief. In all due respect we most vigorously and boldly assert that in Case 1 for over five years, your petitioner has been urging relief on this ground which both the trial Court and the lower Court have denied him.

The lower Court said that your petitioner's third ground of attack, namely, that it was taking his property for public purpose, was without merit and obviously fallacious. The Court continues and says

> "The statutes call for a public sale, upon adequate notice, thus providing reasonable assurance of the property bringing a fair price, and a reasonable redemption period is prescribed."

How grievously the lower Court errs in such statements. The Kentucky Statutes do not permit the sale of real estate for more than the tax bill.

Then the Court continues:

> "if in fact a particular piece of property is sold for a grossly inadequate price perhaps the taxpayer might be entitled to some form of equitable relief, assuming he could show an adequate excuse for not having exercised his right of redemption."

My God! My God! we say it reverently—yes, even in agony of spirit. How can the lower Court in the face of this record make such a statement and in the face of the fact that the Tax Receiver is not allowed

to sell the property for more than the tax bill, interests, penalties and costs. For over five years your petitioner has urged the trial and lower courts to grant him relief and showed that his property worth between $20,000.00 and $25,000.00 is being taken for approximately $1,200.00 or less. Frankly and candidly and in all due respect to the lower Court we are unable to understand why sitting in a court of equity, it would make such a statement and ruling in the face of this record.

The Court continues:

> "the possibility that such a sale might occur is not a ground for holding the statute unconstitutional."

It is not only a possibility but in fact it is common knowledge that no tax bill on realty in the City of Louisville, Kentucky, is sold for more than the taxes, interests, penalties and costs which is always far less than the real value of the property. Hence two years after the sale the Tax Receiver under KRS 91.540 is authorized to convey the fee to the purchaser at the sale without giving the taxpayer a notice and an opportunity to be heard as to whether or not the Tax Receiver in the sale complied with all the statutory requirements of KRS 91.470 and KRS 91.580.

Furthermore, it is unconstitutional because it is taking property—payment of taxes for public purposes without just compensation. The lower Court concludes, "The statute provides adequate means by which the rights of the taxpayer may be protected."

We most respectfully assert that these two cases alone show the utter failure of the statute to provide protection for the taxpayer.

It is most certainly taking his property without due process of law and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States and it is certainly taking his property for public purposes without just compensation—taxes are collected for public purposes and when property is conveyed in payment of a tax bill it is taking it for public purposes, without just compensation contrary to the Fifth Amendment of the Constitution of the United States.

H. Erroneous Reasoning of the Lower Court.

In all due respect, we say it frankly and candidly, we are at a loss to understand or comprehend the reasoning of the lower Court. They say in the face of their own opinions and in the face of the opinions of most every court of last resort in the United States and in the face of the great, vast majority of text writers, that due process of law does not necessarily *mean notice and a hearing before property is taken but that it may be due process of law, if after the taking the taxpayer might possibly recover his property. How the lower Court can say if a court of Equity might grant relief if a particular piece of property was sold for a grossly inadequate price when it has denied your petitioner relief in these cases, we are unable to understand.*

In the face of this record we are unable to follow the reasoning of the lower Court in this statement, "Statute provides adequate means by which the rights of the taxpayer may be protected." The statute has not only not protected your petitioner's rights but has deprived him of them.

In Case 1 at the bar the petitioner not only made timely motions to set aside the default judgment supported by an affidavit, but also tendered an answer and counterclaim supported by a supplemental affidavit which presented a complete defense and which under the lower Court's opinion, in Brunner v. Bell, Ky. 290 S. W. 2d 461, would have granted him relief, and why! Oh why! did the trial and lower Court deny relief we are unable to understand! And, in the face of all of this the lower Court says that KRS 91.540 is constitutional.

I. Collection of Taxes—Necessity—Civil Rights.

(1) COLLECTION OF TAXES.

We are not opposed to the collection of taxes and realize the necessity of it but we most vigorously and earnestly maintain that taxes can and should be collected without violating the taxpayer's constitutional right to due proces and law, namely, a notice and a hearing and without taxpayer's constitutional right not to have his property taken for public purposes without just compensation.

(2) NECESSITY.

Governments as usually understood, we believe in America and in Anglo-Saxon countries, are established by the people and for the people to maintain their inviolate rights—their inalienable rights—not to destroy them. Among said inalienable rights are the right to ownership and protection of private property. The necessity of collecting taxes should be subordinate to the interest of maintaining these inalienable rights. We should not through the plea of necessity in the collection of taxes destroy these rights. As above stated, taxes can be collected without so doing. In other words, the necessity of protecting these inalienable rights should outweigh the necessity of collecting the taxes.

(3) CIVIL RIGHTS.

In the last two or three decades there have been millions and millions of both spoken and written words about Civil Rights in America, especially the civil right to vote. They have been spoken and written by all races and colors—they have been spoken and written by people in every vocation in life. But there has not been very much said about the civil rights of property owners to the protection of their property rights against the taking thereof without due process of law in the collection of taxes, and against the taking thereof for public purposes without just compensation, in the collection of taxes. We very vigorously contend that it is high time that these rights be protected.

J. Conclusion.

For reasons hereinabove set forth your petitioner most respectfully maintains: (1) that his property in both cases was taken without a notice and a hearing and without due process of law, and that KRS 91.540 is unconstitutional and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States, (2) that his property in both cases was taken for public purposes without just compensation under KRS 91.540 and that said statute is therefore void and contrary to the Fifth Amendment of the Constitution of the United States, (3) that his property was taken under a void judgment which conferred no rights and is without due process of law.

We most vigorously and earnestly maintain that KRS 91.540 cannot be held constitutional without reading exceptions which are not in them, into both the Federal and State Constitutions. In other words, the Court must hold that private property cannot be taken without due process of law (which means a notice and a hearing ***before, not after,*** *the taking) except in the* ***collection of City taxes and the Court must hold that*** *private property cannot be taken for public purposes without just compensation except in the collection of* ***City taxes.***

We therefore most respectfully request this Honorable Court to grant this petition for a Writ of Certiorari to the Court of Appeals of Kentucky and

to reverse the lower Court, with instructions to hold KRS 91.540 unconstitutional and the default judgment of October 22, 1956 void.

Very respectfully submitted,

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